

A **CYBER BUSINESS SOLUTIONS SDN BHD**

v.

ELSAG DATAMAT SPA

B HIGH COURT MALAYA, KUALA LUMPUR
ZABARIAH MOHD YUSOF J
[CIVIL SUIT NO: S-22-588-2010]
13 AUGUST 2010

C **ARBITRATION:** *Agreement - Arbitration clause - Dispute whether arbitration should be carried out at the International Court of Arbitration of the International Chamber of Commerce in Paris ("ICC") or under the Rules of Arbitration of Kuala Lumpur Regional Center for Arbitration - Whether the ICC Arbitration Clause was the binding arbitration agreement between the parties*

D **ARBITRATION:** *Arbitration proceedings - Injunction - Injunction restraining arbitration proceedings - Dispute whether arbitration should be carried out at the International Court of Arbitration of the International Chamber of Commerce in Paris ("ICC") or under the Rules of Arbitration of Kuala Lumpur Regional Center for Arbitration - Application by plaintiff for interim injunction to restrain defendant from continuing with ICC Arbitration proceeding in Paris - Whether injunction to be granted*

E **ARBITRATION:** *Jurisdiction - Jurisdiction of court - Whether arbitration clause can oust jurisdiction of Malaysian courts*

F **CIVIL PROCEDURE:** *Injunction - Injunction restraining arbitration proceedings - Dispute whether arbitration should be carried out at the International Court of Arbitration of the International Chamber of Commerce in Paris ("ICC") or under the Rules of Arbitration of Kuala Lumpur Regional Center for Arbitration - Application by plaintiff for interim injunction to restrain defendant from continuing with ICC Arbitration proceeding in Paris - Whether balance of convenience favoured granting of injunction*

G **CIVIL PROCEDURE:** *Jurisdiction - Court - Arbitration - Whether arbitration clause can oust jurisdiction of Malaysian courts*

H The plaintiff and defendant had collaborated to tender for a BSN project. Disputes subsequently arose between BSN and the plaintiff resulting in BSN filing a suit against the plaintiff for alleged breach of contract. The plaintiff in turn filed a 3rd party notice

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against the defendant claiming for an indemnity against the BSN suit. The defendant claimed that as between the plaintiff and the defendant, the operative arbitration agreement was as contained in the “General Supply Terms and Conditions” of the defendant’s “proposals” which provided for arbitration in the International Court of Arbitration of the International Chamber of Commerce in Paris (“the ICC Arbitration Clause”). The plaintiff, on the other hand, claimed that it had never signed the “General Supply Terms and Conditions” with the arbitration clause. The clause in the Sub-Contract provided for any dispute to be settled by way of arbitration under the Rules of Arbitration of Kuala Lumpur Regional Center for Arbitration. (“the KLRCA Arbitration Clause”). The defendant applied for an order that the disputes between the plaintiff and the defendant be referred to arbitration pursuant to the “General Supply Terms and Conditions” of the defendant’s “Proposals”. The learned judge did not grant the said order. In the interim, the defendant had referred the dispute between the plaintiff and the defendant to the ICC of Commerce in Paris. The plaintiff thus applied for an injunctive relief to restrain the defendant from continuing with the ICC Arbitration proceeding in Paris. The defendant, in opposing the plaintiff’s application contended that: (i) the ICC Arbitration Clause was the binding arbitration agreement between the parties; (ii) by virtue of the ICC Arbitration Clause being the binding arbitration agreement between the parties, the jurisdiction of the Malaysian Courts was ousted; (iii) the plaintiff had “wilfully submitted” to the jurisdiction of the ICC such as to oust the jurisdiction of the Malaysian Courts; and (iv) the ICC had already decided the issue. The issue was as to whether any reference for arbitration of disputes between the plaintiff and the defendant ought to be pursuant to the ICC Arbitration Clause or the KLRCA Arbitration Clause.

Held (allowing the plaintiff’s application for the interlocutory injunction with costs):

- (1) The dispute as to which of the two arbitration clauses prevailed should be left to be determined at trial. It was a serious dispute which needed to be resolved via *viva voce* evidence. Therefore, the disputes constituted *bona fide* issues to be tried; *Keets Gerald Francis Noel John v. Mohd Noor bin Abdullah & Ors*; refd. (paras 20-21)

- A (2) Even with the presence of an arbitration clause, the jurisdiction of the Malaysian courts can never be ousted. There can never be an occasion where an arbitration clause ousts the jurisdiction of the courts. (para 23)
- B (3) It was the stand of the plaintiff throughout that the arbitration clause stating that ICC Paris was the forum was not binding on it and that the issue of competing arbitration clauses ought to be resolved by the courts. Therefore, the plaintiff had not willfully submitted to the jurisdiction of the ICC at any point in time. (para 32-34)
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- D (4) It certainly could not be the ICC nor the KLRCA to determine on the jurisdictional issue in view of the competing forum. Given the circumstances of the case, the only recourse was to have a court of competent jurisdiction to determine the issue of which arbitration clause (be it the ICC or the KLRCA) prevailed as the binding one. It was beyond doubt that the High Court was seised with jurisdiction to determine on the jurisdictional issue of the competing forum of the arbitral tribunal. (para 46-48)
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- F (5) The fact that there were two competing arbitral clauses denoted that there were indeed serious issues and disputes to be tried *ie*, whether the ICC Arbitration Clause or the KLRCA Clause prevailed. The plaintiff's claim against the defendant was with regards to damages in the event the court decided that the plaintiff was liable for whatever claims by BSN. Hence, in the event this injunction was wrongly granted, the loss occasioned by the defendant could be reimbursed monetarily. The balance of convenience was for the injunction to be granted. Unless restrained the ICC Arbitration would have gone ahead with the arbitration and making decision on which it may not have the jurisdiction to make in the first place. Parties also would have had to expand exorbitant sums of money for the arbitration process in Paris which would be a waste in the event the court decided that the appropriate arbitration clause was the KLRCA. (para 50)
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Case(s) referred to:

Aras Jalinan Sdn Bhd v. Tipco Asphalt Public Company Ltd & Ors [2008] 5 CLJ 654 HC (*refd*)

Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & 2 Ors [1995] 1 CLJ 293 CA (*refd*)

ISC Technology Sdn Bhd v. Premium Systems Technology Pte Ltd [2008] 7 CLJ 239 HC (*refd*)

Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor [2002] 3 CLJ 213 FC (*refd*)

The Fehmarn [1958] 1 All ER 333 (*refd*)

Legislation referred to:

Arbitration Act 2005, ss. 8, 10, 18(1)

Courts of Judicature Act 1964, s. 23(1)

Other source(s) referred to:

NS Bindra's Interpretation of Statutes, 10th edn, p 465

Sundra Rajoo & WSW Davidson, *The Arbitration Act 2005: UNCITRAL Model Law As Applied In Malaysia*, p 85

For the plaintiff - Conrad Young (SS Ng & Francesca Phillip with him); M/s Sreenevasan Young

For the defendant - Celine Chelludurai (Saritha Devi with him); M/s Zaid Ibrahim & Co

Reported by Amutha Suppayah

JUDGMENT**Zabariah Mohd Yusof J:**

[1] Enclosure 3 is the application by the plaintiff for, *inter alia*, an injunction to restrain the defendant, whether by itself or through its agents, servants or representatives or howsoever, from prosecuting and/or continuing with the ICC Arbitration No. 17117/FM in the International Court of Arbitration of the International Chamber of Commerce.

Background Facts

[2] The plaintiff and the defendant collaborated to tender for a project to replace BSN existing computer loan management system (LMS). The plaintiff was appointed as BSN's main contractor while the defendant was appointed as the plaintiff's sub-contractor.

- A [3] Disputes subsequently arose between BSN and the plaintiff resulting in BSN filing a suit against the plaintiff *vide* defendant – 22NCC-279-2009 claiming for, *inter alia* damages for alleged breach of contract (the BSN suit). The plaintiff in turn filed a counter claim against BSN and also a 3rd party notice against the
- B defendant claiming for an indemnity against BSN suit.

[4] The defendant in the BSN Suit filed an application for the following orders:

- C a) that further proceedings in the 3rd party proceedings be stayed pursuant to s. 10, Arbitration Act 2005; and
- b) the disputes between the plaintiff and the defendant be referred to arbitration pursuant to *inter alia* the “General Supply Terms and Conditions” of the defendant’s “Proposals”.

- D [5] On 7 May 2010 the learned High Court Judge in the BSN Suit granted prayer (a) which in effect staying all proceedings in the 3rd party proceedings for parties to go for arbitration. However, the learned judge did not grant the order for prayer (b)
- E of the defendant’s stay application, ie, for the disputes between the plaintiff and the defendant to be referred to arbitration pursuant to the “General Supply Terms and Conditions” of the defendant’s.

- F [6] In the stay application the defendant contends that as between the plaintiff and the defendant, the operative arbitration agreement was as contained in the “General Supply Terms and Conditions” of the defendant’s “proposals” which provides for an arbitration by a three person panel in the International Court of Arbitration of the International Chamber of Commerce in Paris
- G (The ICC Arbitration Clause).

- [7] The plaintiff on the other hand opposed the defendant’s stay application alleging that it had never signed the “General Supply Terms and Conditions” with the arbitration clause. The
- H defendant contends that, if at all, the operative arbitration agreement between the plaintiff and the defendant was the arbitration agreement as contained in the sub-contract which was finalized and concluded in June 2008 which was signed by the defendant. The clause in the sub-contract provides for any dispute
- I to be settled by way of arbitration under the Rules of Arbitration

of Kuala Lumpur Regional Center for Arbitration by a single arbitrator. (The KLRCA Arbitration Clause) (refer to exh. LKY2 at cl. 25.2) A

[8] In the interim, the defendant had referred the dispute between the plaintiff and the defendant to ICC of Commerce in Paris. B

[9] In encl. 3 herein the plaintiff applies for an injunctive relief to restrain the defendant from continuing with the ICC Arbitration proceeding in Paris. C

[10] The defendant on the other hand submits that the plaintiff has acted in bad faith in filing this application despite its awareness that the ICC has decided on the issue of which arbitration clause was valid and binding ie, whether ICC or KLRCA has the jurisdiction to arbitrate in the dispute. The defendant also argues that the court in BSN suit had decided that any issue relating to the dispute be determined by way of arbitration. D

[11] Nonetheless the plaintiff contends that this court is the proper forum to decide on the issue as to whether ICC Paris or KLRCA Kuala Lumpur has the jurisdiction to arbitrate on their disputes. E

The Courts Findings

[12] The issue is as to whether any reference for arbitration of disputes between the plaintiff and the defendant, ought to be pursuant to the ICC Arbitration Clause or the KLRCA Arbitration Clause. F

[13] This is a situation of two competing arbitration agreements, where each prescribes an arbitration under two different, distinct and separate commercial bodies in two different countries providing dispute resolution services. G

[14] It is due to this situation that the plaintiff felt compelled to bring the present action herein to seek a determination as to which arbitration clause is the operative binding arbitration agreement enforceable against the parties. H

The Distinction Between Arbitration And The Courts

[15] Arbitration is a process of resolving a dispute or a grievance outside a court system by presenting it for decision to an impartial third party. Both sides in the dispute must agree in advance to I

- A the choice of arbitrator and certify that they will abide by the arbitrator's decision. Hence, the forum for arbitration derived its jurisdiction from the agreement by both parties and no other. This point has been reiterated in "*The Arbitration Act 2005: UNCITRAL Model law as applied in Malaysia*" by Sundra Rajoo & WSW Davidson at p. 85 which states:

The jurisdiction of the arbitrator refers to his authority, mandate or competence. Jurisdiction is consensual and is entirely delineated by the arbitration agreement. It is the parties who, by agreement, confer the authority on the arbitrator to decide disputes between them. Indeed, there is no other source for the arbitrator's jurisdiction.

- C [16] In contrast, the jurisdiction of the court is a compulsory jurisdiction as opposed to consensual jurisdiction as in arbitration.
- D [17] Thus, it does not matter whether the parties agree/consent or not, this court has jurisdiction over any matter that falls within s. 23 of the Courts of Judicature Act 1964.

The Application Herein

- E [18] The defendant raised the following contentions in opposing the application herein.
- F (a) That the ICC Arbitration Clause is the binding arbitration agreement between the parties;
- (b) That by virtue of the ICC Arbitration Clause being the binding arbitration agreement between the parties, the jurisdiction of the Malaysian Courts is ousted.
- G (c) That the plaintiff has "wilfully submitted" to the jurisdiction of the ICC such as to oust the jurisdiction of the Malaysian Courts.
- (d) That the ICC has already decided the issue.

Whether The ICC Arbitration Clause Is The Binding Arbitration Agreement Between The Parties

- I [19] There is clear disputes from the affidavits filed by the parties as to which of the two Arbitration Clauses prevails. Plaintiff is contending that it is the KLRCA Arbitration Clause which is binding, as contained in a document signed by the defendant.

Whereas the defendant is contending that the arbitration clause is as contained in the “General Supply Terms and Conditions” of the defendant’s “proposals” which provides for an arbitration by a three person panel in the International Court of Arbitration of the International Chamber of Commerce in Paris.

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[20] From the submission of the defendant, it seems that this dispute can be determined by affidavits alone. I am of the view that this is the wrong approach. Clearly this point of dispute should be left to be determined at trial. It is a serious dispute which needs to be resolved *via viva voce* evidence.

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[21] Therefore, from the totality of the facts as adduced before me, I am satisfied that these disputes constitutes *bona fide* issues to be tried. (Refer to *Keet Gerald Francis Noel John v. Mohd Noor @ Harun Abdullah & 2 Ors* [1995] 1 CLJ 293).

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Whether The Jurisdiction Of The Malaysian Courts Is Ousted

[22] The defendant is contending that since the ICC Arbitration Clause is binding, the jurisdiction of this court is thus ousted.

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[23] This argument by the defendant is misconceived. Authorities have shown that, even with the presence of an Arbitration Clause, the jurisdiction of the Malaysian courts could never be ousted.

[24] One such case is *ISC Technology Sdn Bhd v. Premium Systems Technology Pte. Ltd* [2008] 7 CLJ 239 which illustrates the very same point. The case in question relates to an application made by the defendant therein, to set aside the writ on ground *inter alia* that the agreement on which the plaintiff’s suit was based on, contained an arbitration clause. Hishamuddin J (as he then was) had this to say:

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[7] I am of the view that just because of the existence of the provision of cl. 21 in the distribution agreement it does not necessarily follow that this court has no jurisdiction at all over the dispute between the Plaintiff and the Defendant and that the latter automatically has the right to make an application to set aside the writ under O. 12 r. 7.

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[8] In my opinion, whether this court has the jurisdiction or not to adjudicate over the dispute must be determine by examining the content of the statement of claim and to test it against the provision of s. 23(1) of the Courts of Judicature Act 1964 ...

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A [9] If by so doing, the court is satisfied that *prima facie* the High Court of Malaya has jurisdiction over the dispute then *prima facie* this court has the jurisdiction. The point that I wish to stress here is that **the issue of jurisdiction can never be determined merely by pointing to the existence of such a clause as cl. 21 alone.** (emphasis added)

B [25] Hishamuddin J had referred to the judgment of Lord Denning in *The Fehmarn* [1958] 1 All ER 333 at p. 335 when he stated as follows:

C The next question is whether the action ought to be stayed because of the provision in the bill of lading that all disputes are to be judged by the Russian courts. I do not regard this provision as equal to an arbitration clause, but I do say that the English Courts are in charge of their own proceedings; and one of the rules which they apply is that a stipulation that all disputes should be judged by the tribunals of a particular country is not absolutely binding. Such a stipulation is a matter to which the courts of this country will pay much regard and to which they will normally give effect, but it is subject to the over riding principle **that no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them.** (emphasis added)

F [26] A similar point was also stated in the Federal Court case of *Sanwell Corporation v. Trans Resources Corporation Sdn Bhd & Anor* [2002] 3 CLJ 213 where the Federal Court agreed with the arguments as forwarded by counsel of the appellant. The relevant passages of the judgment are reproduced as follows:

G Mr. Loh argues that where the Plaintiff sues the defendant upon a contract containing an arbitration clause, the defendant does not make an application to set aside a writ or a service of the writ within the meaning of O. 12 r. 7 Rules of the High Court 1980 ("the Rules of the High Court 1980"). This is because the court always has jurisdiction in respect of a contract containing an arbitration clause and subject to the jurisdiction in respect of a contract containing an arbitration clause and, subject to the jurisdiction of the court under the Act to send the matter for arbitration, there is nothing irregular on the part of the plaintiff to file a writ in court notwithstanding the existence of the arbitration clause ...

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We agree with Mr. Loh's submission ...

[27] Hence, by virtue of the above cases cited, it is obvious that there can never be an occasion where an arbitration clause ousting the jurisdiction of the courts. This lends credence to the fact that arbitration forum are consensual as opposed to court forums which are “compulsory non consensual”, hence demarcating the line as to the dissimilarity between the jurisdiction of an arbitration body and the courts.

Whether The Plaintiff Had Willfully Submitted To The Jurisdiction Of The ICC Hence Ousting The Jurisdiction Of The Malaysian Courts

[28] The statement that the plaintiff had “willfully submitted” to the jurisdiction of the ICC is misconceived, when the plaintiff is disputing the arbitration clause that states that the arbitration should be with the ICC.

[29] It is to be noted that even before the High Court granted the stay for arbitration in the BSN suit, the defendant had already issued a “Request for Arbitration” to the ICC, so as to commence proceedings in Paris.

[30] The plaintiff had made representations to the ICC *vide* it solicitors letter dated 26 May 2010 (exh. LKY11) stating that the plaintiff had never at any point in time accepted the said “General terms and Conditions” and had never signed the document to connote an agreement on the part of the plaintiff of the same. As such the plaintiff had indicated to the ICC that the “General terms and Conditions” has never bound the plaintiff and hence the ICC has no jurisdiction to determine on the disputes between the plaintiff and the defendant. By the same letter the plaintiff had also indicated that the plaintiff would be initiating proceedings in the Malaysian Courts to resolve the issue of competing arbitration forum and requested that the “Request For Arbitration” be put in abeyance.

[31] Subsequently by a letter dated 12 July 2010 (exh. LKY15) the plaintiff further states the following to ICC:

9. It is for these reasons that the Malaysian Civil Suit is the proper forum to decide the issue of which of the competing KLRCA Arbitration Clause and ICC Arbitration Clause is the one that prevails. The Malaysian High Court is clearly seised of the jurisdiction to do so as the “disputes” relate to a project undertaken by the parties in Malaysia and all the evidence is in Malaysia.

A 10. That said, it is the Respondent's respectful submission that the Court should leave the issue to be determined by the Malaysian High Court in the Malaysian Civil Suit.

B [32] Hence from the correspondences of the plaintiff, it has always been the stand of the plaintiff throughout, that the Arbitration Clause stating that ICC Paris is the forum, is not binding on it and that the issue of competing Arbitration Clauses ought to be resolved by the courts.

C [33] Therefore, nowhere does the facts ever suggest that the plaintiff had willfully submitted to the jurisdiction of the ICC at any point in time.

D [34] In any event how can one submit to the jurisdiction of the ICC when the very arbitration clause that states that the ICC is the correct forum is being disputed by the plaintiff. In other words the plaintiff had never agreed to have the ICC as the forum of arbitration.

E [35] It is also to be noted that the ICC does not have the equivalent of a conditional appearance when one wishes to challenge on the jurisdiction of the Arbitration forum. After the "Request for Arbitration" was issued by the defendant, art. 6(2) of the ICC Rules of Arbitration comes into play. This art. 6(2) reads as follows:

F If the Respondent does not file an answer, as provided by Article 5, or if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement, the court may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is *prima facie* satisfied that an arbitration agreement under the Rules may exist.

G In such case, any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself. If the Court is not so satisfied, the parties shall be notified that the arbitration cannot proceed. In such case, any party retains the right to ask any court having jurisdiction whether or not there is a binding arbitration agreement.

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I [36] Thus, from the provision as mentioned above there is nothing much that the plaintiff could do to prevent the defendant from calling the conduct of the plaintiff as submitting to the jurisdiction of the ICC, save to raise a challenge which was evidenced in the various correspondences by the plaintiff to the ICC.

Whether The ICC Had Determined On The Jurisdictional Issue A

[37] The defendant submits that the ICC had already decided on the jurisdictional issue, on a *prima facie* basis on 16 July 2010 (exh. PS12).

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[38] Hence the defendant submits that, for this court to try and resolve this issue now would clearly cause absurdity and embarrassment to the respective courts.

[39] The defendant further submits that in any event, the present suit and this application are clearly redundant and the issues therein became moot, in the light of the finding of the ICC. The defendant refers to s. 8 of the Arbitration Act 2005 which provides that:

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unless as otherwise provided, no court shall intervene in any of the matters governed by this Act.

[40] It is further argued by the defendant that s. 18(1) of the Arbitration Act 2005 provides that the Arbitral Tribunal may rule on its own jurisdiction including any objections with respect to the existence or validity of the arbitration agreement. This is exactly what the ICC had determined. The defendant has cited the case of *Aras Jalinan Sdn Bhd v. Tipco Asphalt Public Company Ltd & Ors* [2008] 5 CLJ 654 where the High Court in its judgment held that the High Court had no inherent powers to intervene in arbitration matters where the seat of jurisdiction was outside of Malaysia. However, my view is that the facts in *Aras Jalinan Sdn Bhd* does not concern two competing arbitration clause/forum. Hence the said case is not applicable nor is it of any help to our present predicament.

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[41] To determine whether the ICC had decided on this jurisdictional issue, I am of the view that the letter from ICC dated 16 July 2010 (exh. PS12) ought to be perused. The contents of the same states that the ICC “decided that, pursuant to art. 6(2) of the Rules, this arbitration shall proceed.” The letter does not state that as far as jurisdiction is concerned it has been determined, it just states arbitration is to proceed.

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[42] What is relevant to take note of is the relevant portion of art. 6(2) of the ICC Rules of Arbitration states that:

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- A ... if any party raises one or more pleas concerning the existence, validity or scope of the arbitration agreement, the court may decide, without prejudice to the admissibility or merits of the plea or pleas, that the arbitration shall proceed if it is *prima facie* satisfied that an arbitration agreement under the Rules may exist.
- B In such case, **any decision as to the jurisdiction of the Arbitral Tribunal shall be taken by the Arbitral Tribunal itself.** If the Court is not so satisfied, the parties shall be notified that the arbitration cannot proceed. In such case, any party retains the right to ask any court having jurisdiction whether or not there is a binding arbitration agreement. (emphasis added)
- C [43] From the provision of art. 6(2) of the same, it is clear that the ICC had not determined the jurisdictional issue yet. For all intents and purposes, it merely passes the task as to the jurisdiction of the Arbitral Tribunal to the Arbitral Tribunal to decide.
- D [44] As far as s. 18 of the Arbitration Act 2005 is concerned, it provides as follows:
- E (1) The arbitral tribunal **may rule on its own jurisdiction,** including any objections with respect to the existence or validity of the arbitration agreement. (emphasis added)
- F [45] Clearly, a plain reading of the section envisages a situation where the Arbitral Tribunal can only rule on its own jurisdiction, and not others. To interpret otherwise would cause absurdity. On this point I refer to *NS Bindra's Interpretation of Statutes*, 10th edn, at p. 465 which states as follows:
- G If the language of a statutory provision is plain, the court is not entitled to read something in it which is not there, or to add any word or to subtract anything from it.
- H In *Miller v. Salamons*, Pollock CB said:
- If the meaning of the language be plain and clear we have nothing to do but obey it – to administer it as we find it, and I think, to take a different course is to abandon the office of judge, and to assume the province of legislation.
- I [46] Further, if the ICC can determine other arbitral tribunal's jurisdiction, then similarly the KLRCA could also determine on the jurisdiction of the ICC, which would not solve the issue at hand ie, which arbitration clause/forum of arbitration is applicable. Decision has to be made as to which forum can arbitrate on the

disputes between the plaintiff and the defendant. It certainly cannot be the ICC nor the KLRCA to determine on the jurisdictional issue in view of the competing forum. A

[47] Given the circumstances of the case, the only recourse is to have a court of competent jurisdiction to determine the issue of which of the Arbitration Clause (be it the ICC or the KLRCA) prevails as the binding one. B

[48] The next question is which court to determine the same. Having regard to s. 23(1) of the Courts of Judicature Act 1964 the following is not disputed: C

- i) The LMS Project that the plaintiff and the defendant collaborated on took place in Malaysia;
- ii) The works were executed in Malaysia; D
- iii) The LMS system constructed for BSN and all its hardware and software are located in Malaysia;
- iv) The “proposals” of the defendant were issued to the plaintiff in Malaysia; E
- v) The sub contract was finalized and concluded in Malaysia;
- vi) The witnesses including the witnesses from BSN’s are all from Malaysia. F

[49] Therefore, it is beyond doubt that this court is seised with jurisdiction to determine on the jurisdictional issue of the competing forum of the arbitral tribunal.

[50] Whether An Injunction Should Be Granted As Prayed G

- a) Whether there are issues to be tried

The fact that there are two competing Arbitral Clauses denotes that there are indeed serious issues and disputes to be tried ie, whether it is the ICC Arbitration Clause (which provides for an arbitration by a three person panel under the ICC Rules in Paris) or the KLRCA Clause (providing for arbitration by a single arbitrator under the KLRCA Rules in Kuala Lumpur) prevails. H

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A b) Whether damages is adequate remedy

The claim by the plaintiff against the defendant is with regards to damages in the event that the court decides that the plaintiff is liable for whatever claims by BSN. In other words the basis of the claims is purely monetary. Hence in the event this injunction is wrongly granted, the loss occasioned by the defendant could be reimbursed monetarily.

B c) Balance of convenience

C The balance of convenience is for the injunction to be granted. Unless restrained the ICC Arbitration would have gone ahead with the arbitration and making decision on which it may not have the jurisdiction to make in the first place.

D It is also to be noted that parties would have to expand exorbitant sums of money for the arbitration process in Paris which would be a waste in the event this court decides that the appropriate arbitration clause is the KLRCA. Unnecessary and undue hardships would be caused to the parties.

E It would not prejudiced the defendant in any way as the disputes of the defendant would in any event be arbitrated at the end of the day. It is just a question of determining which arbitration forum would be hearing the disputes.

F **Conclusion**

[51] Therefore premised on the abovesaid, the application by the plaintiff for an interlocutory injunction as per encl. 3 is allowed with costs.

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